No. 82-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MICHAEL McCRAY,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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Michael McCray respectfully petitions for a writ of certiorari to review the judgment in this case of the Court of Appeals of the State of New York.

QUESTIONS PRESENTED

1. May a prosecutor utilize race as a principal factor in determining whether to exercise a peremptory challenge of a prospective juror? If not, does the systematic use of peremptory challenges to exclude all black and hispanic jurors in a criminal case raise an inference that race has been impermissibly used as a factor in the jury selection process?

2. May a prosecutor peremptorily challenge and exclude all black and hispanic jurors in a criminal case, consistent with the defendant's right to be tried by a jury drawn from a representative cross-section of the community, as guaranteed by the Sixth and Fourteenth Amendments?

3. Does this Court's holding in Swain v. Alabama, 380 U.S. 202 (1965), forbid a finding that a prosecutor's use of peremptory challenges to exclude all black and hispanic jurors in a criminal case violates equal protection absent statistical evidence establishing a pattern and practice of such exclusions and, if so, should that holding now be modified?

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The opinion of the New York Court of Appeals (App. at 1a-40a) is not yet reported. The opinion of the Appellate Division (App. at 41a) is reported at 84 A.D.2d 769 (2d Dept. 1981). The opinion of the trial court denying petitioner's post-conviction motion for a mistrial or, alternatively, for an inquiry into the prosecutor's use of her peremptory challenges (App. at 42a-50a) is reported at 104 Misc.2d 782 (Sup.Ct.Kings Co. 1980). The trial court's opinion denying petitioner's motion for a new trial during *voir dire* (App. at 51a-67a) was rendered orally and never published.

JURISDICTION

The judgment of the New York Court of Appeals was entered on December 14, 1982. Jurisdiction is conferred on this Court by 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Fourteenth Amendment provides, in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protion of the laws.

STATEMENT OF THE CASE

Michael McCray is a young black man who was convicted by an all white jury of first and second degree robbery based on identification testimony.

The robbery occurred in downtown Brooklyn during the evening of November 15, 1978. Philip Roberts, a local art student, had just withdrawn twenty dollars from an automatic bank machine when he was surrounded by several youths, pushed into the vestibule of an apartment building and robbed at gunpoint. McCray was arrested three weeks later when Roberts picked him out on a street corner while cruising the neighborhood in a police car. No one else was ever arrested for the crime. McCray had never been arrested before and has not been arrested since.

Two trials then ensued. The first trial ended in a hung jury with three black jurors in

favor of acquittal.[1] The second trial ended in conviction and concurrent sentences of 2-6 years on the charge of first degree robbery and 1-1/2 - 4-1/2 years on the charge of second degree robbery.[2]

In the process of selecting a jury for the second trial, the prosecution exercised eleven peremptory challenges. Eight of those challenges were used to excuse the only minority members drawn for the jury panel: seven blacks and one hispanic. Asserting that the prosecutor's action violated the federal Constitution as well as New York State law (52a-55a), petitioner moved for a mistrial, or

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1/ An earlier proceeding had ended in a mistrial after four jurors were selected because of a variance between the date of the crime as set forth in the indictment and complainant's statement.

2/ McCray's sentence has been stayed by Chief Judge Cooke of the New York Court of Appeals until ten days after the petition for certiorari is filed.

alternatively, for an inquiry to determine whether the prosecutor's use of her peremptory challenges was based, as it appeared, exclusively on race.[3/] Those motions were denied by the trial judge and voir dire continued. (63a-66a).

The jury that convicted McCray was composed entirely of whites. After conviction, McCray moved for a new trial, alleging again that the use of peremptory challenges to create an all white jury violated his right to "a jury of his own peers" under "our constitution." That motion, too, was denied by the trial judge, who concluded on the basis of this Court's decision in Swain v. Alabama, 380 U.S. 202 (1965), that the use of peremptory

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3/ In support of his motion, defense counsel pointed out that the minority jurors excluded by the prosecution shared nothing in common except their race. Indeed, one black juror was excluded by the prosecution even though his relative had been a crime victim -- a fact that would normally be thought to favor the prosecution. (54a-55a).

challenges in a particular case is immune from inquiry. (43a).[4/] Neither decision by the trial judge contains any finding on the critical question of whether the prosecutor actually utilized her peremptory challenges to exclude minority jurors. Indeed, the trial judge considered that question so legally irrelevant that he never sought any explanation for the undisputed fact that every black and hispanic on the jury panel was peremptorily excused by the prosecution.[5/]

On appeal, McCray's conviction was affirmed without opinion by the Appellate

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4/ In the course of his oral decision denying petitioner's post-conviction motion for a new trial, the trial judge suggested some uncertainty in his own memory about whether a black juror had eventually been seated. In fact, a black alternate was seated but never served. Unfortunately, the voir dire in this case was never recorded.

5/ A prosecutor's desire to exclude every black from a criminal jury trying a black defendant was portrayed by the trial judge as sound, and even commendable, legal strategy. (45a, 60a-61a).

Division (41a) and in a 4-3 decision by the New York Court of Appeals (1a-40a). The majority quickly dismissed McCray's federal claim by relying on Swain and then rejected the invitation to "depart[] from this holding" in construing New York's own constitution. (2a).

The majority's interpretation of federal law and this Court's decisions were strongly disputed by the dissent. Pointing out that Swain was decided "solely on equal protection grounds" at a time when the Sixth Amendment had not yet been applied to the states, Judge Meyer concluded that,

> the use by a prosecutor of peremptory challenges systematically and without apparent reason to exclude all blacks on the panel from the petit jury before which is to be tried a black defendant charged with robbing a white victim violates the Sixth Amendment guarantee of a fair trial by an impartial jury. (19a).

Unlike the typical case in which majority and dissent disagree on their interpretation of a given case, here the majority and dissent

could not even agree on which precedents were relevant. The majority began and ended its analysis with Swain. Judge Meyer, by contrast, adopted the view that Swain had been modified, if not superseded, by Taylor v. Louisiana, 419 U.S. 522 (1975), which held that the Sixth Amendment requires a jury drawn from a representative cross-section of the community.

In a separate dissent, Judge Fuchsberg described the record in this case a "a classical picture of intentional and systematic exclusion [from the jury] on account of race, creed, color or national origin." (32a). This picture, he reasoned, violated petitioner's constitutional rights "without more and absent any countervailing explanation." Id.

REASONS FOR GRANTING THE WRIT

This case presents an unresolved question which is crucial to the administration of criminal justice in this country. At issue is the reconciliation of two decisions by this Court and the interpretation of two constitutional provisions.

In Swain v. Alabama, 380 U.S. 202 (1965), this Court held that a prosecutor's use of peremptory challenges could not be attacked under the Equal Protection Clause, or even subject to inquiry, merely by showing that every minority juror had been excused in a particular case. Ten years later, in Taylor v. Louisiana, 419 U.S. 522 (1975), this Court ruled that the guarantee of an impartial jury embodied in the Sixth Amendment demands that each jury be drawn from a representative cross-section of the community. In between, the Sixth Amendment was deemed applicable to the states in Duncan v. Louisiana, 391 U.S. 145 (1968).

What this case demonstrates is that the relationship among these decisions has been the source of considerable confusion throughout the nation. Specifically, this Court has never indicated whether the creation of an all white jury through the use of peremptory challenges by the prosecution violates the Sixth Amendment principles announced in Taylor or whether such situations remain governed by Swain despite subsequent developments in constitutional law. The few hints that exist support petitioner's position. In Taylor itself, this Court explicitly distinguished between an equal protection challenge to jury composition and a challenge based on the representative cross-section requirement of the Sixth Amendment. 419 U.S. at 533-34. That distinction has been adopted in other decisions as well. E.g. Duren v. Mississippi, 439 U.S. 357, 368 n.26 (1979). To the extent that the Sixth Amendment offers a different framework for jury

exclusion cases, the decision below was plainly incorrect in its analysis of petitioner's constitutional claim.

In any event, the premises of Swain should now be re-examined in light of eighteen years' experience with its implementation. The decision in Swain represented an effort to balance two competing interests. On the one hand, the Court strongly condemned, as it has condemned for more than a century, any effort to limit jury service on the basis of race. On the other hand, the Court was anxious to preserve the unconditional nature of peremptory challenges as a time-tested device for securing impartial juries and promoting public confidence in the jury system. Accordingly, the Court fashioned a rule which made it impossible even to question the racially motivated use of peremptory challenges in a particular case absent statistical evidence establishing a pattern and practice of racial

exclusions. Any other rule, the Court feared, would inevitably destroy the value of peremptory challenges.

It is now clear that both sides of the Court's equation in Swain have been empirically disproved. The burden imposed on criminal defendants in Swain has proved insuperable in practice. As a result, the decision has had the unfortunate effect of condoning what it sought to condemn: the deliberate selection of all white juries through manipulation of a prosecutor's peremptory challenges. Most defendants lack the time, money and capacity to mount the sort of statistical case which Swain demands. Moreover, the rule in Swain does nothing to protect the first victim of discrimination in a particular jurisdiction. On the other side of the scale, those states which have departed from Swain under their own constitutions have not experienced the wholesale disruption of peremptory challenges which Swain

envisioned. Instead, procedures have been developed which effectively protect both a prosecutor's interest in peremptory challenges and a defendant's right to a representative jury. Those same procedures can and should be incorporated in a new federal rule which more faithfully reflects the constitutional interests at stake.

Finally, there is presently a conflict among the states, and between state and federal courts, on the constitutional protections afforded a defendant whose jury has been purged of minority members by a prosecutor's use of peremptory challenges. That conflict can only be resolved by this Court.

I. THE DECISION BELOW CONFLICTS WITH TAYLOR v. LOUISIANA

In Taylor v. Louisiana, 419 U.S. 522, 527 (1975), this Court declared "that the American concept of a jury trial contemplates

a jury drawn from a fair cross-section of the community." The court below held that this requirement had been satisfied notwithstanding the fact that every minority member of the jury panel in this case had been excused through use of the prosecutor's peremptory challenges. That result can only be sustained by repudiating the principle which Taylor announced.

The importance of diversity as a means of securing the impartial jury which the Sixth Amendment commands has long been recognized by this Court. Taylor itself approvingly quotes Justice Marshall's opinion in Peters v. Kiff, 407 U.S. 493, 503-04 (1972):

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from a jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that their exclusion deprives the jury of a perspective on human events

> that may have unsuspected importance in any case that may be presented.

See also Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting).

Justice Marshall's observations are especially pertinent in a case such as this which hinged almost entirely on identification testimony. It does not require extensive sociological citation to appreciate that the possibility of a white victim misidentifying a black youth on an urban street corner three weeks after a crime may be more readily understood by black jurors than white jurors. Indeed, this Court has held for more than a century that the purposeful exclusion of minority members from jury service fatally undermines the representative character of the jury as an institution. Strauder v. West Virginia, 100 U.S. 303 (1980).

This is not to suggest that the jury actually chosen in any particular case must

faithfully duplicate the ethnic composition of the community at large. Taylor v. Louisiana, 419 U.S. at 538. But the constitutional imperative of an impartial jury drawn from a fair cross-section of the community which Taylor endorsed is plainly frustrated by the prosecutor's use of peremptory challenges to exclude potential jurors on the basis of race alone.[6/]

The court below endeavored to distinguish Taylor on the ground that it only applies to jury pools and has no application to the process of jury selection. The point of demanding a representative jury pool, however, is to maximize the chance of obtaining a representative jury. The intentional exclusion of prospective

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6/ As Judge Meyer's dissent noted, "the fair cross section-impartiality requirement is meaningless if in any case involving a defendant of a given race the prosecutor can intentionally and systematically exclude all members of that race without cause. (26a).

jurors on the basis of race, whether in the process of compiling a jury pool or selecting a jury, is equally destructive of the constitutional goal.[7/]

In rejecting petitioner's constitutional claim, the New York Court of Appeals felt bound by Swain and its interpretation of the Equal Protection Clause. For reasons set forth in the following section, petitioner believes that Swain should now be re-examined. But regardless of the outcome of that re-examination, the court below entirely overlooked petitioner's independent rights under the Sixth Amendment. The symmetry between the Equal Protection Clause and the Sixth Amendment presumed by the Court below is unsupported by this Court's

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7/ Another goal of the fair cross-section requirement recognized in Taylor is to promote "public confidence in the fairness of the criminal justice system." 419 U.S. at 530. Such confidence is unlikely to be felt by a minority community which observes the systematic exclusion of every black juror through the prosecutor's use of peremptory challenges.

decisions which carefully stress that "equal protection challenges to jury selection and composition are not entirely analogous" to cases brought under Taylor and its progeny. Duren v. Mississippi, 439 U.S. 357, 368 n.26 (1979).

This Court should decide whether petitioner's trial before an all white jury crafted by the prosecutor's use of peremptory challenges violated his right to an impartial jury guaranteed by the Sixth Amendment.

II. THIS CASE PRESENTS A TIMELY OPPORTUNITY TO RE-EXAMINE THE HOLDING OF SWAIN v. ALABAMA

Under the rule announced by this Court in Swain v. Alabama, 380 U.S. 202 (1965), a defendant must demonstrate a pattern and practice of racial exclusions from jury service in order to prove that the jury selection process in his own case has been racially biased. In theory, the rule was intended to effectuate

this Court's long-standing view, restated in Swain, that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors violates the Equal Protection Clause." 380 U.S. at 204. In practice, it has had precisely the opposite effect. This Court could not have intended that result.

The burden of proof fashioned by the Swain Court represented an obvious attempt to balance two competing interests. On the one hand, the Court was committed to the principle of racial equality in the administration of justice. On the other hand, the Court was concerned that the system of peremptory challenges could not survive even a limited inquiry into the prosecutor's motives based on the record in a single case. Eighteen years later, it is now apparent that the balance struck by the Swain Court was based on assumptions that have proven invalid.

Most significantly, the burden of proof established in Swain has been virtually impossible for defendants to meet. In this case, for example, there are no available statistics which document the pattern of peremptory challenges by the Kings County prosecutor. Accordingly, to satisfy the Swain test, McCray would have had to transcribe enough voir dire proceedings to create a statistically significant sample, assuming that a significant number of voir dires are even recorded.[8/] The time and expense involved in that undertaking are evident. Even then, there is no assurance that the transcripts would be helpful since the race of prospective jurors is often not revealed during voir dire. Furthermore, all of this discovery must be accomplished virtually overnight since its need

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8/ Many voir dires, including McCray's, are conducted without a stenographer present.

does not arise until a defendant's own jury selection is already underway.[9/] And, by definition, the first victim of discriminatory jury selection in a jurisdiction can obtain no relief under Swain.

Given these difficulties, it is hardly surprising that in the decade following Swain not a single defendant was able to satisfy its stringent standard. Annot., "Use of Peremptory Challenge to Exclude From Jury Persons Belonging to a Class or Race," 79 A.L.R.3d 14, 24 (1975). Placed in the context of this Court's other decisions on racial discrimination in the administration of justice, it is difficult to believe that Swain was meant to erect such an absolute barrier to equal protection claims.

9/ The complexity of the statistical case required by Swain is fully described in Winick, "Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis," 81 Mich.L.Rev. 1, 21-39 (1982).

The consequences of Swain have been strongly condemned by many legal commentators.[10] Its approach has also been rejected by three different states in construing their own constitutions. People v. Wheeler, 22 Cal. 3d 263, 583 P.2d 748 (1978); Commonwealth v. Soares, 377 Mass. 461, 389 N.E.2d 499, cert. denied, 444 U.S. 881 (1979); State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980).

The rule adopted in each of these state cases is essentially the same and fully respects the important value of peremptory challenges. Thus, under the so-called Wheeler rule, the exercise of peremptory challenges in any given case is presumed to be valid. But

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[10] E.g. Brown, McGuire & Winters, "The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse," 14 New Eng.L.Rev. 192 (1978); Winick, supra n.4; Comment, "The Prosecutor's Exercise of the Peremptory to Exclude Non-White Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause," 46 U.Cin. L.Rev. 555 (1977); Note, "Limiting the Peremptory Challenge: Representation of Groups on Petit Juries," 86 Yale L.J. 1715 (1977).

unlike Swain, that presumption can be rebutted by a showing that prospective jurors are being challenged "because of their group association rather than because of any specific bias." People v. Wheeler, 22 Cal.3d at 281.

Among the relevant factors identified by Wheeler in making that showing are whether all or most of an identified group have been excluded from jury service, whether a disproportionate number of peremptories have been used against a specific group and whether members of that group have been excused with little or no questioning. If a prima facie case is made, the burden shifts and the prosecutor must offer some reason other than group bias for the exercise of his peremptory challenges. The burden is a minimal one, however, and "need not rise to the level of a showing for cause." 22 Cal.3d at 282.

The reported decisions do not reveal

any disruption in the system of peremptory challenges as a result of this modification of the Swain test.[11/] The positive values identified in Swain are still being served -- namely, the elimination of perceived bias and the increased confidence of litigants in the system of justice. 380 U.S. at 219. At the same time, the Wheeler rule minimizes the likelihood that peremptory challenges will be used to disguise racial discrmination or obtain a racially skewed jury which does not fairly reflect the community it represents.[12/]

11/ There have been eight reported decisions applying Wheeler in California. None indicates any problem with the rule's implementation or any concern about its effect on peremptory challenges. E.g. People v. Randle, 130 Cal.App.3d 499 (1982); People v. Allen, 23 Cal.3d 286, 590 P.2d 30 (1979). The same is true in Massachusetts and New Mexico.

12/ The district attorney joined petitioner below in seeking a constitutional ruling that peremptory challenges should not be used to

(fn. cont. on next page)

Simply put, Swain has not accomplished the goal it was designed to achieve. With hindsight it is now clear that Swain's attempt to balance competing interests has been imbalanced from the start. As a result, this Court has inadvertently endorsed a procedure which is rife with the possibilities of abuse. Based on the actual experience of the last eighteeen years -- in jurisdictions

(fn. continued from preceding page)
exclude prospective jurors solely on the basis of race. (2a). The district attorney opposed petitioner's request for a new trial, however, by arguing that petitioner did not make a showing at trial sufficient to satisfy even the Wheeler test. That assertion ignores the fact that every minority member of the jury panel in petitioner's case was excluded by the prosecution's peremptory challenges, and that the prosecution's peremptory challenges were disproportionately directed against minority jurors. In any event, what petitioner is seeking from this Court is a standard by which his claim can be tested. He should not be faulted for failing a test that did not apply at the time of his trial. See Franks v. Delaware, 438 U.S. 154 (1978). Furthermore, it is obvious from the trial judge's opinion that no showing by petitioner would have been sufficient to question the prosecution's peremptory challenges.

which have followed Swain and in those which have departed from it -- petitioner respectfully submits that Swain should now be modified to permit the sort of limited inquiry contemplated by Wheeler. In so doing, this Court will more faithfully enforce the fundamental principles which Swain espouses.[13/]

13/ Since Swain, this Court has extensively reviewed the burden of proof in discrimination cases. In effect, petitioner is seeking the same shift in the burden of production that applies in virtually every other discrimination context. As explained by this Court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the burden of persuasion remains throughout the litigation with the party asserting discrimination. Once a prima facie case of discrimination is presented, however, the party charged with discrimination must assert some legitimate, non-discriminatory reason for the challenged action. 450 U.S. at 254. This burden of rebuttal is not an onerous one, but it is nonetheless more than is currently required by Swain when a criminal defendant's liberty may be at stake. The appropriateness of applying the general principles of discrimination law to the jury selection process was recognized by this Court in Castaneda v. Partida, 430 U.S. 482 (1977).

III. THE DECISION BELOW HIGHLIGHTS A CONFLICT AMONG THE STATES IN CONSTRUING THE SIXTH AMENDMENT

The dispute between the majority and dissenting opinions below on whether the Sixth Amendment's guarantee of an impartial jury places any limit on the use of peremptory challenges to disqualify jurors on the basis of race reflects a more general debate that now exists throughout the country on this critical question of constitutional law. Two state courts have expressly adopted the view advocated by the dissent that Taylor v. Louisiana applies to jury selection and prohibits the creation of unrepresentative juries through racially-based peremptory challenges. People v. Payne, 106 Ill.App.3d 1034, 436 N.E. 2d 1046 (1982); People v. Lucero, 99 Cal.App. 3d 17 (1979). In addition, the New Mexico Supreme Court has cited Taylor in support of the proposition that "[r]ecent United States Supreme Court decisions infer that the

challenge allowed in Swain may be too limited." State v. Crespin, 94 N.M. 486, 612 P.2d 716, 717 (1980). Other state and federal courts, including the New York Court of Appeals, have rejected the notion that Taylor modified Swain or that the Sixth Amendment may guarantee rights in this situation which do not exist under the Equal Protection Clause. These conflicting views of constitutional law can only be reconciled by a decision from this Court.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be issued in this case.

Respectfully submitted,

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COURT OF APPEALS
STATE OF NEW YORK
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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

- against -

MICHAEL McCRAY,

Appellant.
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Gabrielli J. -- Section 270.25 of the Criminal Procedure Law states that: "A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service." This right to peremptory challenges has been exercised by prosecutors and defendants in this State pursuant to the same or similar statute for over 100 years (see People v. Walter, 32 N.Y. 147). In Swain v. Alabama (380 U.S. 202), the Supreme Court determined that a prosecutor is not required to disclose

his reasons for excusing prospective jurors in a particular case on the mere allegation by the defense that peremptories are being used to exclude minority jurors. We find nothing in our State Constitution or statutes which compels a departure from this holding of the Supreme Court.[1/]

Defendant was convicted of robbery in the first and second degrees for his part in the Nov. 15, 1978 gunpoint robbery of Philip Roberts, a student at Pratt Institute. After Roberts had withdrawn money from an automatic bank teller machine, the defendant and several companions pushed him into the vestibule of an apartment building and took his money. Defendant was identified by Roberts several weeks later when, while Roberts was being driven by

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1/ I observe on this underlying issue that the People join defendant in contending that the provisions of our State Constitution prohibit the use of peremptory challenges to exclude potential jurors solely on the basis of race.

police around the neighborhood where he was accosted, he spontaneously picked out the defendant from a group of four individuals standing on a street corner.

During jury selection, the defense moved for a mistrial, claiming that the prosecutor had unlawfully used peremptory challenges to exclude jurors on the basis of race. In the alternative, the defense moved for a hearing to inquire into the prosecutor's use of her peremptory challenges. In pursuing these motions, the defense pointed out that eight of the eleven peremptory challenges exercised by the prosecutor had been used to exclude all of the blacks and the only hispanic prospective juror drawn. Nevertheless, these defense motions were denied. The court relied upon Swain v. Alabama (supra) in concluding that it is inappropriate to inquire into a party's motives solely on the basis of the manner in which peremptory challenges have been

exercised in a single case. On the appeal from defendant's conviction, the Appellate Division affirmed, without opinion. Defendant now argues to this court, inter alia, that the trial court committed reversible error in denying his motion for a mistrial or for a hearing to inquire into the prosecutor's intentions and motives in exercising peremptory challenges to exclude certain jurors.

The issue of minority representation on criminal juries has been the subject of several decisions by the Supreme Court. These decisions draw a critical distinction between the jury pool, which is the group of prospective jurors from which the litigants will select a jury to hear their particular case, and the jury that is ultimately chosen to serve. The Sixth Amendment requires that the jury pool be selected from a representative cross-section of the community (Taylor v. Louisiana, 491 U.S. 522), and distinctive groups in the community

may not be systematically excluded from the pool. Once the jury pool is selected, however, prospective jurors may then be excluded through the exercise of cause challenges and peremptory challenges. The challenge for cause removes those jurors who either admit to actual bias or those who admit to circumstances from which the law will infer an overwhelming potential for bias. The peremptory challenge, in contrast, is a challenge for which no reason need be assigned. This challenge enables either the prosecutor or the defense to exclude prospective jurors who may harbor subtle prejudices which may be sensed by counsel but which are not explicitly revealed by the prospective juror on voir dire.[2/] It is also designed to permit counsel to remove prospective jurors who counsel may have

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2/ The number of peremptory challenges that may be exercised by each party is strictly limited by C.P.L. Section 270.25(2).

alienated during the course of questioning on voir dire.

In Swain v. Alabama (supra), the Supreme Court clearly determined that the prosecutor's motives for striking particular jurors may not be subjected to scrutiny simply upon the assertion by the defense that peremptories are being used to exclude minorities. The Court noted that only if it can be established that the prosecutor's office is using peremptory challenges systematically to exclude minorities from juries over a period of time will a prima facie case of discrimination be made out. The decision in Swain upheld the traditional model for jury selection, which "assumes that impartiality is best realized by first choosing a pool of jurors from the community at large, excusing those clearly biased, and then permitting the parties to excuse additional jurors who, in their view, are less likely than others to provide a fair trial." (Saltzburg and Powers,

Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L.Rev. 337, 355).

In urging a reversal in this case, defendant argues that this Court should reject the holding of the Supreme Court in Swain on the basis of the provisions of our State Constitution. Defendant would have this Court overturn the present system of limited peremptory challenges by requiring the prosecutor to shoulder the burden of assigning and proving jusitifable reasons for his exercise of these challenges whenever there is a statistically supportable allegation that the prosecutor is removing prospective jurors on the basis of their status as minority members of the community. The defendant, in effect, would require the prosecutor to prove that a prospective juror's racial biases, whether based upon group affinity or otherwise, would interfere with the attainment of a fair and impartial verdict

before that juror could be excused. We decline to adopt this position for it would convert the peremptory challenge system into a system based solely upon challenges for cause. Indeed, we find no persuasive reason for departing from our present method of jury selection.

A system which would require counsel to prove that a prospective juror harbors racial, sexual or religious prejudices that could interfere with the attainment of a fair and just verdict would succeed in eliminating only the most blatant biases from the jury. To begin with, we must recognize that it is the sad reality of our times that predisposition and bias may, in some individuals, be based upon racial, religious or sexual status. At the extreme end of the spectrum, those who admit to such prejudices or admit to membership in groups from which such prejudices may readily be inferred, obviously should be disqualified

from sitting on juries where these prejudices could interfere with the attainment of a fair and just verdict. For example, fundamental fairness dictates that a member of the Ku Klux Klan be disqualified from sitting on a jury in a case in which a black man is accused of assaulting a white. These individuals can adequately be eliminated through the challenge for cause. Just as dangerous to the attainment of justice, however, is bias on the part of jurors which is not quite as overt in speech or behavior. While the questioning that takes place on voir dire is perfectly suited to ferret out and eradicate blatant and admitted bias from the jury, it is simply unlikely to disclose certain subtle and hidden biases which could prevent the jury from rendering a fair and impartial verdict. Several reasons for the inadequacy of voir dire for this purpose have been identified (see Saltzburg and Powers, Peremptory Challenges and the Clash Between

Impartiality and Group Representations, 41 Md. L.Rev. 337, 355). First, jurors may be reluctant to admit their prejudices before spectators or others present in the court room during the voir dire. Second, certain prospective jurors may evade full disclosure of their prejudices in an effort to avoid being struck from the jury. Finally, other prospective jurors may simply be unaware of the existence of certain biases or prejudices they may harbor. A system of jury selection in which reasons must be assigned for the removal of individual jurors seriously hampers the elimination of these biases from the jury. The inadequacy of relying upon voir dire to filter out all potential biases based upon group affinity is exacerbated by the reluctance of some trial judges to permit extensive time-consuming voir dire examination.

In this vein, it has long been recognized that one who discriminates "cannot be expected

to declare or announce his purpose. Far more likely is it that he will pursue his discrimination practices in ways that are devious, by methods subtle and elusive -- for we deal with an area in which subtleties of conduct * * * play no small part" (Matter of Holland v. Edwards, 307 N.Y. 38, 45; see also Imperial Diner v. State Division of Human Rights, 52 N.Y.2d 72, 77). In order to effectively meet this problem the usual and more demanding standards of proof have been reduced in cases where the object of the law is to eliminate discrimination or bias (Matter of Holland v. Edwards, supra). In the jury selection process that rule is served by the peremptory challenge which permits an experienced attorney to eliminate a juror who he believes might be biased against his case in instances where the potential bias cannot be disclosed or articulated to the degree necessary to establish a challenge for cause.

We further note that inherent in relying upon the cause challenge to eradicate certain prejudices from the jury is that litigants may be reluctant to engage in the intensive questioning needed to reveal the biases of potential jurors. Pointed questions directed at an area as sensitive as a potential juror's racial, religious or sexual biases may, even where such biases do not exist, alienate a juror against counsel and his position. To avoid the possibility of such juror alienation, counsel may be forced to accept the risk that biased jurors may be sworn to serve on the jury.

Furthermore, to the extent that restrictions on a party's exercise of the peremptory challenge would require more extensive voir dire to disclose provable racial biases, as well as requiring extensive evidentiary hearings on motions to determine the motives of a party exercising a peremptory challenge, the rule proposed by the defendant would invite the

additional delays at trial which our justice system can ill afford. In this era of overcrowded court calendars and scarce judicial resources, we should not alter the trial stage in such a way as to necessitate or encourage unwarranted additional lengthy delays.

Finally, under the system proposed by defendant there is a danger that the prejudices of prospective jurors may not be recognized by trial judges, despite the presence of answers given on voir dire which suggest the possibility of bias. Due to the sensitivity of the subject of racial, religious or sexual prejudice, trial judges may be hesitant to strike a juror on this basis, particularly when the juror denies the existence of such bias. As a result, the spectre of racial prejudices influencing jury verdicts may be heightened rather than hindered under the defendant's proposed formulation. This danger does not exist under a system where counsel may excuse a limited

number of prospective jurors without assigning specific reasons for doing so.

Although concern has been expressed over the possible abuse of a system containing unrestricted peremptory challenges, the potential for abuse is limited by certain practical considerations. If counsel excuses potential jurors on the basis of group status he or she will waste limited peremptory challenges which could be used to excuse other potential jurors who might be more predisposed to the opponent's position. Furthermore, counsel must be aware that he may alienate those jurors ultimately selected if it becomes apparent that selection was made upon the basis of group status.

For all of the foregoing reasons, we find no compelling basis for rejecting the holding of the Supreme Court in Swain v. Alabama, supra. The benefits of requiring the prosecutor to justify the exercise of certain peremptory challenges are simply outweighted by the

damage to a system of jury selection which best serves to guarantee a fair and impartial jury. As the Supreme Court noted, the peremptory challenge "'must be exercised with full purpose'" (Swain v. Alabama, supra, at 219, citing Lewis v. United States, 146 U.S. 370, 378).

Additionally, some comment should be made regarding the defendant's reliance (and, indeed, that of the District Attorney) upon certain provisions of our State Constitution. They first refer to article I, Section 2 of the New York State Constitution, which guarantees the right to trial by jury, and Section 1 of that same article, which appears to specify that conviction of a defendant must be by "the judgment of his peers." In Taylor v. Louisiana (419 U.S. 522), the Court held that the Sixth Amendment right to a jury trial, a right which obviously and necessarily implies the right to a judgment of one's peers, requires only that distinctive groups in the community may not be systematically

excluded from the jury pool. Nothing in the language of our State's counterpart to the Sixth Amendment right to a jury trial suggests that the framers of our State Constitution intended a more expansive interpretation. Similarly, there is nothing in the language or history of our State equal protection provision (Article I, Section 11) which suggests that the scope of the rights guaranteed by this provision should extend beyond the rights guaranteed by the equal protection clause of our Federal Constitution in this instance. It must be recalled that in Swain, the Supreme Court specifically rejected the federal equal protection challenge, and our Court has held that our State constitutional equal protection clause is no more broad in coverage than its Federal prototype (Matter of Esler v. Walters, 56 N.Y.2d 306).[3/] Furthermore, defendant's

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3/ In Matter of Esler, supra, we said: "In certain areas, of course, the State Constitution

(fn. cont. on next page)

reliance on our State Constitution's due process provision is also unavailing.

We have considered defendant's remaining contentions and we find them to be without merit.[4/] Accordingly, the order of the Appellate Division should be affirmed.

(fn. continued from preceding page)
affords the individual greater rights than those provided by its Federal counterpart. We have noted, however, that the wording of the State constitutional equal protection clause (N.Y. Const., art. I, Section 11) 'is no more broad in coverage than its Federal prototype' and that the history of this provision shows that it was adopted to make it clear that this State, like the Federal Government, is affirmatively committed to equal protection, and was not prompted by any perceived inadequacy in the Supreme Court's delineation of the right (Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 530-531)" (56 N.Y. 2d at 313-314 [footnote omitted]).

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We have no occasion to pass on the merits of defendant's contention that improper negative identification testimony was admitted in this case. The testimony of which defendant complained (anticipated by both counsel in their openings) was as to the failure of the complainant to earlier identify defendant among those individuals he viewed in the neighborhood several weeks after the robbery took place.

* * *

Order affirmed. Opinion by Judge Gabrielli in which Chief Judge Cooke and Judges Jasen and Wachtler concur, Chief Judge Cooke in a concurring memorandum. Judge Meyer dissents and votes to reverse in an opinion in which Judge Jones concurs. Judge Fuchsberg dissents and votes to reverse in a separate dissenting opinion.

Cooke, Ch. J. (concurring) -- I concur in the majority's holding that the prosecutor's use of peremptory challenges did not violate defendant's constitutional rights.

I also agree that this court need not decide the negative identification issue, but for a reason different than that implicitly adopted by the majority, which erroneously concludes that defendant's counsel opened the door to this testimony. Assuming arguendo that admission of the negative identification testimony

was improper, in light of the entire record, including defense counsel's own reference to this subject in his opening statement, the error, if any, cannot be said to have prejudiced defendant.

Meyer, J. (dissenting) -- In my view the use by a prosecutor of peremptory challenges systematically and without apparent reason to exclude all blacks on the panel from the petit jury before which is to be tried a black defendant charged with robbing a white victim violates the Sixth Amendment guarantee of a fair trial by an impartial jury. I, therefore, dissent.

Defendant, a black man, was indicted for first degree robbery. The complainant was a white man. During selection of the trial jury, after the prosecution had exercised 11 of its 15 peremptory challenges, defendant moved for a mistrial on the ground that the prosecutor had

by peremptory challenge excluded all seven blacks and the one hispanic who had been drawn as prospective trial jurors up to the time the motion was made. In the course of argument of the motion, defendant's attorney asked for a hearing at which the prosecutor would testify concerning the grounds for the challenges. The trial judge denied the motion and thereafter filed an opinion (104 Misc.2d 782) in which he reasoned that the "potential affinity" between a defendant and a juror who shares the defendant's background justified the peremptory challenges exercised by the People and that under Swain v. Alabama (380 U.S. 202, 222): "In light of the presumption of regularity and the historic immunity from inquiry concerning the use of peremptory challenges, it is inappropriate to inquire into a party's motives solely on the basis of the manner in which peremptory challenges have been exercised in a single case" (104 Misc.2d at 784). The Appellate

Division affirmed without opinion.[1/]

Swain, upon which the majority and the courts below so heavily rely, was decided solely on equal protection grounds. Acknowledging that jurors "should be selected as individuals, on the basis of individual qualifications, and not as members of a race" (380 U.S. at 204), and that nothing in the Constitution of the United States requires the grant of peremptory challenges (id., p. 219), the Supreme Court held that to subject the prosecutor's scrutiny for reasonableness and sincerity would establish a rule wholly at odds with the peremptory challenge system. Excusal

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1/ The inconsistency between that affirmance and the earlier opinion of the same Department in People v. Thompson (79 AD.2d 87, app. withdrawn 55 N.Y.2d 879) which after extensive and thoughtful analysis held such a use of peremptory challenges unconstitutional undoubtedly resulted from its holding that Thompson would not be applied retroactively (79 AD.2d at p. 112, n.22). Thompson was decided on Feb. 2, 1981. The McCray jury was selected on April 24, 1980.

of blacks on the basis of their potential affinity for a black defendant, it reasoned, did not violate the equal protection clause of the Fourteenth Amendment; such a violation could be established only if purposeful discrimination by state officials was shown (id., pp. 219-224) as when "the prosecutor in a county, in case after case, whatever the crime and whomever the defendant or victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." (id. at p. 223).[2/]

Not addressed by Swain, which was decided prior to the holding in Duncan v. Louisiana

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2/ Although only four justices concurred in the part of the opinion from which the quoted words are taken, the three dissenting justices who argued that the proof presented was sufficient to demonstrate a constitutional violation implicitly agreed with it.

(391 U.S. 145) that the Fourteenth Amendment made applicable to the state the Sixth Amendment's guarantee of trial by an impartial jury, was the effect of the latter provision. The Supreme Court's subsequent holding in Taylor v. Louisiana (419 U.S. 522) that the Sixth Amendment requires a jury pool made up of a representative cross section of the community has raised the question whether the Court when confronted by the situation of the present case, involving not the pool but the petit jury itself, will adhere fully to its Swain ruling. At least one court (People v. Payne, Ill.App.3d 1034, 1042) has concluded, as do I, that Duncan and Taylor compel a result different from Swain.

In Taylor v. Louisiana, supra, the Supreme Court construed the Sixth Amendment to require a pool of jurors representing a fair cross-section of the community. The purpose of the fair cross section requirement is to assure

that the jury reflects the broad range of human experience. But a petit jury from which all members of defendant's race have been purposefully excluded is not a petit jury "representative of a cross section of the community who have the duty and the opportunity to deliberate" (Taylor v. Louisiana, 419 U.S. 522, 528, quoting Apodaca v. Oregon, 406 U.S. 404, 410-411 [plurality opinion]; see Williams v. Florida, 399 U.S. 78, 100). Indeed, as the Supreme Court has noted in another context, such a procedure "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process" (Rose v. Mitchell, 443 U.S. 545, 555-556). Nor is such a jury impartial, even though each of its members considered individually may be, for as stated by Justice Thurgood Marshall, concurring in Peters v. Kiff (407 U.S. 493, 503) and quoted with approval in the majority opinion in Taylor v. Louisiana (419 U.S. 522, 532 n.12, supra).

> "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented."

It is no answer to suggest, as does the majority, that so to hold is inconsistent with the legislative definition of a peremptory challenge as "an objection to a prospective juror for which no reason need be assigned" (C.P.L. 270.25, subd. [1]). Nor, contrary to the majority's suggestion does so holding require a prosecutor to prove bias or even assign a reason for each peremptory challenge. What such a rule would do, rather, and all it would do, would be to call upon a prosecutor who had so exercised his peremptories as to exclude from the petit jury all members of

defendant's race and thus evidenced his or her intention to have defendant tried before a racially imbalanced jury to offer reasonable explanations for the various challenges grounded in a reason other than race. To the extent that C.P.L. 270.25 (subd. [1]) appears to be inconsistent with such a rule it must, on familiar principles, be construed so as to avoid inconsistency with the Sixth Amendment (cf. People v. Thompson, 79 A.D.2d 87, 109, n.20, supra), for the fair cross section-impartiality requirement is meaningless if in any case involving a defendant of a given race the prosecutor can intentionally and systematically exclude all members of that race without cause.

This does not mean that a prosecutor may never exercise a peremptory challenge against a black in a case involving a black defendant. Peremptory challenges are intended to permit elimination from the jury of persons whose bias is suspect but cannot be proven, to assure that

those who ultimately constitute the petit jury "will decide on the basis of the evidence placed before them and not otherwise" (Swain v. Alabama, 380 U.S. at 211-212, 219, supra). But that does not provide carte blanche to exclude all blacks for that reason alone. Even in a case in which the testimony is expected to reveal that a key witness has referred to defendant as "the nigger," a prosecutor may not exclude all blacks through the exercise of peremptory challenges. Rather his obligation to maintain the fair cross section diversity of the petit jury requires voir dire inquiry by him of black prospective jurors concerning whether they will be able to weigh objectively the testimony of a witness who used such a racial epithet. (People v. Johnson, 22 Cal.3d 296).

To hold otherwise is to sanction under the guise of fairness or tradition, or both, deliberate discrimination by a state official.

There can be only two explanations for a prosecutor's challenge of all the members of the defendant's race. First, the prosecutor might have legitimate reasons to doubt the impartiality of each individual. If that be the case, however, the state will not be harmed if he is asked to articulate those reasons and justify the challenges.[3/] The only other possible explanation for the prosecutor's elimination of all blacks from the jury is his mistrust of the ability of blacks, as a group, to be impartial. But the corollary of this view, in a case like this where the complainant and defendant are

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3/ The contrary suggestions of the majority, more fully answered in the text of this dissent, below, would be more convincing if supported by empirical evidence from California, Massachusetts or New Mexico, each of which, in reliance on respective state constitutional provisions, has held (People v. Wheeler, 22 Cal.3d 258; Commonwealth v. Soares, 377 Mass. 461, cert. den., 444 U.S. 881; State v. Crespin, 94 N.M. 486) that the representative cross section requirement forbids the "potential affinity" peremptories which the majority now sanctions.

of different races, is that whites cannot be trusted either.[4/] The result is that the defendant, unable to remove whites from the jury, is deprived of an impartial jury. As the Supreme Judicial Court of Massachusetts put it in Commonwealth v. Soares (377 Mass. 461 at 487-488, supra):

> "Given an unencumbered right to exercise peremptory challenges, one might expect each party to attempt to eliminate members of those groups which are predisposed toward the opposition. However, when the defendant is a minority member, his attempt is doomed to failure. The party identified with the majority can altogether eliminate the minority from the jury, while the defendant is powerless to exclude majority members since their number exceeds that of the peremptory challenges available. The result is a jury in which the subtle group biases of the majority are permitted to operate, while those of the minority have been silenced."

4/ Of couse, if one assumes that neither blacks nor whites are necessarily partial, there can be no justification for peremptorily challenging either group as a class.

The practical difficulties of according a defendant such a right are exaggerated by the majority. First, as to the voir dire itself, the prosecutor who must look at jurors as individuals rather than members of a group would be in no different position than his adversary is now. Faced with more veniremen of the victim's group than he can excuse, the defense attorney must find an individual basis for each challenge. I do not doubt that prosecutors are equal to the same task and can perform it without excessively delaying the trial. Second, expeditious procedures can easily be developed for hearing a motion for a mistrial on this ground. The Second Department's proposed procedure, for example, depends to a large extent upon the trial court's observation of the voir dire. In most cases, the argument of counsel, the prosecutor's explanation and the court's observation will be sufficient to decide the motion. "Only in the unusual case,

if at all, would it appear that a hearing would be necessary" (People v. Thompson, supra, 79 AD.2d at 109).

It is not necessary to spell out in meticulous detail the exact procedure to be followed in hearing such motions for one to recognize that the potential for delay of the judicial process can never be so harmful to the institution as is the violation of the Sixth Amendment's impartial jury requirement sanctioned by allowing the exercise of peremptory challenges solely on the racial basis of "potential affinity." A verdict which is acceptable to whites but not to blacks is not the verdict of an impartial jury. The defendant's motion for a mistrial should not have been denied without a statement by the court of his observations or an explanation from the prosecutor of his reasons for challenging the eight minority jurors.

There should be a reversal and a new

trial.[5/]

Fuchsberg, J. (dissenting) -- Standing alone, the record here, featuring the People's use of 8 of its 11 exercised peremptory challenges to excuse all of the seven blacks and the lone hispanic drawn from the venire, on its face presented a classical picture of intentional and systematic exclusion on account of race, creed, color or national origin. As such, without more and absent any countervailing explanation, I agree with my fellow dissenters that it ran counter to the defendant's

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5/ Although in some circumstances remittal for a hearing may be proper (see People v. Payton, 51 N.Y.2d 169, 176-178; cf. People v. Havelka, 45 N.Y.2d 636), such a remittal would not be proper in the present case in view of the time elapsed and the fact that, apparently, the voir dire was not recorded (People v. Thompson, 78 AD.2d at 111, n.22, supra).

constitutional rights[1] to be tried by a jury drawn from a randomly-selected, representative cross section of the community. True, attempts to pursue the cross section ideal are commonly, and most efficiently, managed in the formation of the jury pool from which the venire is drawn rather than at the picking of the petit jury. This does not mean, however, that its purposeful frustration at the latter stage is to be countenanced. Since, at the very least then, the trial court should have granted defendant's motion for a hearing, I agree there indeed should be a reversal and a new trial.

I also firmly believe that guidelines to aid in the determination of the existence of purposeful and systematic discrimination, the finding of which will so heavily depend upon a trial court's personal observations, would best be developed by "the step-by-step and case-by-

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1/ U.S. Const., 6th, 14th Amdts. (see Taylor v. Louisiana, 419 U.S. 522).

case evolution characteristic of the common law" (People v. Andre W., 44 N.Y.2d 178, 185).

So I cannot accept my fellow dissenters' assumption that whatever procedure might be adopted to investigate discrimination in this context should include an obligation that a prosecutor or other counsel so charged with exercising peremptories explain, whether by argument or testimony, the grounds for the challenges. This may be better understood against some comment on the nature and essentiality of the function of the peremptory challenge.

Having evolved over the centuries as a unique and effective key to securing an impartial jury while assuring litigants and the public of its fairness, the peremptory challenge is not to be underestimated. In large part this is because the challenge for cause (C.P.L. 270.20), fashioned essentially to eradicate the smaller incidence of patent prejudice rather

than the far greater one of latent prejudice, cannot hope, by itself, to provide full protection from partiality (cf. People v. Provenzano, 50 N.Y.2d 420). Surely, absent impartiality, the petit jury would lack a jurisprudential ingredient on a par with cross sectionalism.

For impartiality cannot be taken for granted. It would be naive in the extreme to entertain the notion, shared perhaps by philosophers without experience, that jurors, unlike other persons, do not bring with them the biases produced by their respective environments, education, group affiliations, occupational experiences and the like. Moreover, many prospective jurors report for service with predispositions or misconceptions, often subconscious or not well thought out, concerning certain types of cases or litigants. Since self-appraisal may be too subjective for appreciation of one's underlying prejudice, self-esteem too blinding for acknowledgement of an inability

to overcome it and self-confession too embarrassing to be made in public, as often as not voir dire, even when not too circumscribed, will not disclose bias sufficiently to support a challenge for cause (Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L.Rev. 337, 355; Suggs & Sales, Juror Self-Disclosure on Voir Dire: A Social Science Analysis, 55 Ind.L.J. 245; Babcock, Voir Dire, "Preserving Its Wonderful Power," 27 Stan.L. Rev. 545, 554).

The peremptory challenge fills this gap. While, in the vernacular, we often say that a lawyer is to "select a jury," this function, realistically regarded, more accurately may be seen as one to "unselect a jury." After all, operating under our adversary system, with rare exceptions, the aim of each advocate is to eliminate those jurors most likely, in the circumstances of the case at hand, to favor the

position of his or her client. In short, subject to errors of judgment, targeted are the extremes of partiality, in principle a most valuable purpose.

Historically and today, to give the peremptory challenge the full sway it needs to do its job, "no reason need by assigned" for its use (C.P.L. 270.25). Taking the statute at its word, not only need no reason be articulated, but none need exist and, when it does, any reason, save when it bespeaks systematic and intentional exclusion of the unmistakable kind we encounter in this case, should do. This includes anything which motivates human conduct, ranging all the way from intuition, courtroom nuances, the set of a face and a willingness to gamble on a replacement to calculated judgment of what effect a particular juror's background and personality is likely to have in appraising the facts and personalities on which a verdict will turn. For instance,

should one quarrel with the right of counsel to strike a juror whose youthful idealism may produce a touch of hardness, or the corresponding right of the adversary to eliminate an older person whose mellowness he senses will have brought a forgiving appraoch? Or with the right, while representing a female client, to excuse a taleswoman because of a belief that women can be each others' severest critics? Or, too, depending on the case committed to counsel's trust, in preferring the perceived openhandedness of a salesman over the precision of a toolmaker or the caution of a loan officer, as the case may be? Or, even because one is rich and the other poor? Or, sensitive to the realities of life in a pluralistic society, to legitimately consider any and all of a venireperson's varied socioeconomic striations and the attitudinal effect these may have wrought? Or, knowing too little about the individual jurors, because the lawyer makes

one of these sensitive decisions on a stereotypical basis? Centuries of experience say the answer is no.

All this in mind, in order to correct occasional lapses into purposeful discrimination as such, it would be most unfortunate to adopt a procedural norm which would require every trial advocate to not only search his or her soul and subconscious but, figuratively, to look over his or her shoulder before challenging a prospective juror who shares a "common characteristic" with the opposing party or with another juror whom the attorney has already excused. Though the rejection by counsel of an invitation to explain a seemingly discriminatory challenge, of course, may make far less likely a finding that it in fact was not discriminatorily motivated, the letter and spirit of the legislative provision that "no reason need be assigned" should be respected.

This said, I would reverse and order a

new trial.

Decided December 14, 1982.

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- v -

MICHAEL McCRAY,

Appellant.

Judgment of the Supreme Court, Kings County (Starkey, J.), rendered February 19, 1981, affirmed. No opinion. This case is remitted to the Supreme Court, Kings County, for further proceedings pursuant to C.P.L. 460.50 (subd. 5). Margett, J.P., O'Connor, Weinstein and Thompson, JJ., concur.

Decided November 9, 1981.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM

THE PEOPLE OF THE STATE OF NEW YORK :

- against - :

MICHAEL McCRAY, :

Defendant. :

JAMES G. STARKEY, J.

During jury selection in the captioned case, the defendant (a black male), by his counsel, moved for a mistrial on the ground that the prosecutor had consistently excused, by peremptory challenges, black and Hispanic candidates. At the time the motion was made, seven black candidates and one Hispanic had been excused in that fashion. That conduct, it was urged, constituted improper use of peremptory challenges to exclude potential jurors on the ground of race. The prosecution denied excusing jurors on the ground of race and the motion was denied.

The defense then moved, in the alternative, for a hearing and the opportunity to examine the prosecutor under oath concerning her intent and motives in the exercise of the challenges. That motion was also denied.

Thereafter, the trial proceeded to a conclusion and on April 28, 1980, the defendant was convicted of robbery in the first and second degrees. This decision is written to set forth the applicable law and the basis for the rulings referred to above.

The threshold problem confronted by the defense argument is that historically, the basis for the exercise of peremptory challenges is immune from inquiry (see Swain v. Alabama, 380 U.S. 202, 219-220; Lewis v. United States, 146 U.S. 370, 378; see, also, C.P.L. 270.25, subd. 1)[1/]

1/ "A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service."

It is true, as urged by the defense, that there is authority for the proposition that "it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury * * * from which all persons of his race or color have, solely because of that race or color, been excluded by the State" (Hernandez v. Texas, 347 U.S. 475, 477; see also, Castaneda v. Partida, 430 U.S. 482, 492). Perhaps more to the point, there is also authority for the proposition that the basis for the exercise of peremptory challenges is not totally immune from inquiry and that the systematic exclusion of all persons of a specific race or color from trial juries solely on the basis of race or color is, similarly, prohibited (see Swain v. Alabama, supra, at pp. 223-224).

But the defense argument blurs some vital distinctions and lumps together two wholly different propositions. It is one thing to say

that the law prohibits discrimination in jury selection based solely on race and quite another to say it prohibits challenging all candidates of the same race, religion or national origin as the defendant.[2/] In the latter case, at least presumptively, the challenges are based not on race, religion or heritage, but on the ground of potential affinity with a defendant who shares the same background -- a time-honored basis for the exercise of peremptory challenges (see Swain v. Alabama, 380 U.S. 202, 220-221, supra).[3/]

2/ If the defense could show a policy of the District Attorney to excluse all blacks from all juries -- without regard to the defendant's race or any other circumstances -- a different question would be presented (see Swain v. Alabama, 380 U.S. 202, 223-224, supra). But no such allegation is made and there is no suggestion that there is any basis for such an allegation.

3/ The question is not whether a potential juror of a particular race or nationality is in fact partial, but whether one from a different

(fn. cont. on next page)

In light of the presumption of regularity and the historic immunity from inquiry concerning the use of peremptory challenges, it is inappropriate to inquire into a party's motives solely on the basis of the manner in which peremptory challenges have been exercised in a single case. "The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury * * * The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result * * * would establish a rule wholly at odds with the peremptory challenge system as we

(fn. continued from preceding page)
group is less likely to be. (See Swain v. Alabama, supra, at p. 221.) "The defendant's right is a neutral jury. He has no constitutional right to friends on the jury" (Fay v. New York, 332 U.S. 261, 288-289).

know it" (Swain v. Alabama, supra, at p. 222).

Further, any other rule would present obvious practical questions concerning the administration of justice. If the defense were entitled to a hearing based solely on a pattern of excusals in a single case, logic and fairness would require that the prosecution have the same right[4/] (see Commonwealth v. Soares, ___ Mass. ___, ___, n.35, 387 NE.2d 499, 517, n.35; People v. Wheeler, 22 Cal.3d 258, 282, n.29).

Predictably, hardly a trial would pass without both sides being entitled to such an inquiry.[5/] Given potential affinity as the

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4/ Defense attorneys have frequently been observed exercising their peremptory challenges so as to exclude, systematically, prospective jurors who share the background of an important prosecution witness.

5/ The implications become even more troublesome when it is noted that there would be no rational basis for restricting the principle to criminal cases and excluding civil actions (see People v. Wheeler, 22 Cal.3d 258, 288, supra [dissent]).

likely and reasonable explanation, such a rule would be, on its face, both inappropriate and unacceptable in its consequences to the expeditious and orderly administration of justice.

While the defense has not explicitly urged that potential affinity -- "group affiliation", as it is sometimes called -- is also an objectionable basis for the exercise of peremptory challenges, this court is aware that some authority exists for the proposition (see Commonwealth v. Soares, supra; People v. Wheeler, supra; People v. Kagan, 101 Misc.2d 274).

With all due deference to the courts which decided those cases, this court disagrees. In the first instance, as noted previously, peremptory challenges based on potential affinity have historically been recognized as reasonable and acceptable. Secondly, the practical consequences to the orderly and expeditious administration of justice mentioned above apply

with even greater force here (see People v. Wheeler, supra, at p. 288 [dissent]).

Finally, it should be noted that the remedy for improper exercise of peremptory challenges (based on potential affinity) would necessarily include dismissal of the sworn jurors and the panel from which they were drawn (see Commonwealth v. Soares, supra, at pp. ___, 518; People v. Wheeler, 22 Cal.3d 258, 282, supra). Either side, then, could possess the capacity to compel his adversary to choose (repeatedly, if necessary) between conceding an unfair advantage or aborting the trial. Presumedly, the party with the less advantageous position on the merits would be the one most tempted to exercise that power.

Concerning the prohibition of challenges based on potential affinity, Justice RICHARDSON has well summarized the probable consequences in his dissenting opinion in People v. Wheeler (supra).

"Further, rather than guaranteeing an impartial trial, I think the only guarantee is that the present lengthy process of voir dire will be rendered lengthier still. In my opinion, the majority position is wrong in concept and will prove illusory and unworkable in application." (People v. Wheeler, supra, at p. 288).

Decided June 13, 1980.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM PART 28

THE PEOPLE OF THE STATE OF NEW YORK, :

- against - :

MICHAEL McCRAY, :

Defendant. :

Indictment: 4189/78

BEFORE: HON. JAMES G. STARKEY,
Justice Presiding
April 24, 1980
Brooklyn, NY

APPEARANCES:

OFFICE OF EUGENE GOLD, ESQ., District Attorney, Kings, by SHARON LITWIN, ESQ., Assistant District Atty., for the People

OFFICE OF LEON POLSKY, ESQ., Legal Aid Society, by JOEL DECKLER, ESQ. for the Defendant

THE CLERK: Indictment 4189/78, Michael McCray. Defense counsel present. The People are present. Defendant is present.

THE COURT: Both sides ready to proceed?

MISS LITWIN: Yes.

Mr. Deckler: I have two motions to make prior to the continuation of the jury selection.

THE COURT: Go ahead.

MR. DECKLER: Going through the number of rounds we've already gone through with jury selection, Miss Litwin has systematically peremptorily challenged every single black and Hispanic person. In particular, she's challenged Mrs. Terry -- these are peremptorily -- Mr. Garrison, Mrs. Green, Mrs. Cooper, Mr. Saunders, Miss Bishop; Mr. Gonzalez on the last round, Mr. Smith.

I have a two-fold argument that I will make in moving for a mistrial. I feel that the State, in the person of Miss Litwin, is

systematically excluding black and Hispanics from this jury.

I would cite, Your Honor, the case of Castaneda v. Partida, 430 U.S. 482, 51 Lawyers Edition 2d 498. That case deals with the grand jury system but it uses language from a case of Hernandez v. Texas, 347 U.S. 477, which also quotes Alexander v. Louisiana, 405 U.S. 625, 628, 31 Lawyers Edition 2d 536. The language found on page 509 of the Castaneda case, "This Court has long recognized that 'it is a denial of the equal protection of the laws to try a defendant of a particular race or color under an indictment issued by a grand jury....from which all persons of his race or color have, solely because of that race or color, been excluded by the State..." Now that did not happen in this case in the grand jury process, but it is happening in the petit jury process and it's happening by an agent of the State.

The case is called the People of the State

of New York against Michael McCray; the person prosecuting that action for the state is Miss Litwin.

If we go down the list of individuals, some of them did express that they knew people who had been convicted of crimes or were accused of crimes awaiting trial, but they all said they could be fair.

Then there were other people like Mrs. Green, Mrs. Cooper and Mr. Gonzalez who never stated that they knew anybody who had committed a crime or were suspected of committing a crime or accused of having committed a crime. Then we have Mr. Smith. I waited until today to make this motion until I saw what Miss Litwin did with Mr. Smith who was the last potential juror of the last go-around. Mr. Smith not only did not state that he knew somebody who had been accused of a crime or convicted of a crime, he stated that either a relative or close friend -- I forget which now -- was

actually a victim of a crime -- a victim, I believe, after a robbery and shot during the course of the robbery and, yet, Miss Litwin even excluded and peremptorily challenged him, which leads me to believe that she is doing it on a systematic basis.

Assuming, arguendo, that Your Honor does not accept that argument, the New York State Judiciary Section 500 states, "It is the policy of this state that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit jurors selected at random from a fair cross section of the community or other governmental subdivision wherein the court convenes."

Now I submit that by Miss Litwin challenging every single black person and Hispanic person, she is defeating the intent of the Legislature. She is defeating the intent of the statute. And on those two bases I move for a mistrial.

THE COURT: Mr. Deckler, would you repeat

the citations of the cases you're relying on, please.

MR. DECKLER: It's language from the case of Castaneda v. Partida, 430 U.S. 482, 51 Lawyers Edition 2d 498. The language I am quoting from appears on page 509. It's language in the case, although it appears to be quoting another case. I'm not relying on that to say that -- I'm not challenging the grand jury system as was done in the Castaneda case and, apparently, the Hernandez and Alexander cases; but what I am saying as in the grand jury, or petit jury, the same is occurring: we're not getting black or Hispanic people on the jury.

There have been seven black people and one Hispanic venireman up to this point. Miss Litwin has challenged each and every one of them. Of her eleven challenges, she has used eight to challenge blacks and Hispanics.

THE COURT: Mr. Deckler, as I understand

it, though the authorities that you rely on do not relate to the exercise of challenges, but, rather, peremptory challenges, the guarantees that relate to the pool from which grand jurors and petit jurors are selected, being --

MR. DECKLER: That's correct.

THE COURT: -- a cross section of the community.

Let me ask you this: Would the defense's position be the same if the defendant were an Irish Catholic, or a Jew and the prosecution -- well, let's change that example slightly. Let us just say an Armenian, and the prosecution challenged the same number of Armenians who wound up in the jury box during jury selection?

MR. DECKLER: I would, of course, make the same argument. I would --

THE COURT: Just a minute. Didn't you say that the rule referred to prohibits systematic exclusion on the basis of race.

MR. DECKLER: Race. I was just going to

point that out.

THE COURT: There's no Armenian race as far as I know.

MR. DECKLER: I was going to say and I started to say before you interrupted me, although I would make the same argument and I started to say, I would point out that the language of the case talks about of a particular race or color. So, I would make that argument. I don't think it would be as strong as it is in this case because here we're talking about a defendant of a particular race or color, either black or negroid race and black color, and the fact that Miss Litwin has seen fit to challenge seven people of that race and one Hispanic person.

THE COURT: It seems to me you're lumping two things together, Mr. Deckler, as part and parcel of the identical principle, and I'm not sure that the two are identical. Indeed, I have a feeling that they are not.

The principle to which you make reference, it seems to me, is one well founded in the traditions and the legal jurisprudence of this country. That is to say, each citizen is equal -- at least in the eyes of the law -- and may not lawfully be discriminated against solely on the basis of his race, religion and the like. That is one thing, and it means to me that the state or an agency of the state may not lawfully exclude individuals from a jury panel, or perhaps when a logical and arguable extension from a jury selected from a panel, ignoring for present purposes the countervailing arguments against inquiring into the manner in which peremptory challenges historically an area privileged or, at least, qualifiably privileged from inquiry.

Ignoring that argument for just a moment and embracing the proposition, at least for present purposes, that an impropriety might occur if prospective jurors were challenged

solely on the basis of race by an agency of the state. It seems to me, at least presumptively so, in the context of a black defendant, an Armenian, a Jewish defendant or an Irish defendant that when a party exercises challenges to excuse people -- prospective jurors of the same background, heritage, ethnicity as the defendant, that the challenge then is based not upon race, color, heritage and the like, but, rather, on the ground of potential affinity, invoking the old and honored principle uttered, I believe by the Supreme Court, which goes, substantially, that a defendant has the right to a fair jury, not a right to a friend on the jury.

And it seems to me to be a reasonable proposition and one not running afoul of the principle that prospective jurors should not be excluded or discriminated against, after all is said and done, on the grounds of race, religion and the like, for either side to protect their

legitimate interests in getting a fair jury by exercising challenges to protect against the possibility of an affinity, whether it be by a juror with the defendant from the prosecution's viewpoint or, conversely, a juror who might have an affinity, real or imagined, with a key prosecution witness such as the complainant from the viewpoint of the defense.

And I would doubt, for example -- I can't recall the name of the complainant in this case.

MR. DECKLER: Philip Roberts.

THE COURT: Roberts. Well, it's not a clearly definable name, or not one that I would jump to the conclusion as associated with a particular ethnic group. It sounds Anglo-saxon, I guess, though it's becoming harder and harder to tell in the mix of our society. But, if the name were conspicuously and notoriously Armenian say, or Greek, I can tell you that I would give very short shrift to comparable complaint

on the part of the prosecution to the effect that the defense was systematically challenging Greeks, or prospective jurors who were recognizably people who shared the same heritage as the prosecution's star witness.

MR. DECKLER: You see, the language of the cases I cited doesn't talk about an affinity -- What we have to look --

THE COURT: Precisely my point.

MR. DECKLER: Right. But I cannot delve into Miss Litwin's mind. Since Your Honor did raise the question, I would, at least, ask for a hearing at which Miss Litwin would testify to state her grounds for challenging the various people I mentioned.

It's hard for me to believe that Mr. Smith would have a natural affinity -- Mr. Smith being the relative or close friend of the person who was shot at, or shot or wounded by a gun during the course of a robbery, why he would have an affinity solely because his skin

color is black, or brown, and he's considered a black man, and Mr. McCray is a black man.

THE COURT: Mr. Deckler, you may feel that way, but I don't know that you or the Court could reasonably postulate that view as conclusively established on the one hand, and hold in the same breath that a reasonable man or woman could not reasonably hold a contrary view.

MR. DECKLER: That's why I'm asking for a hearing which would ask Miss Litwin to testify as to why she excluded these various people.

THE COURT: Here we get to a point, Mr. Deckler, where it seems, to me, two propositions, two barriers arise which militate, in any event, against granting that application.

The first is that as an object of proposition, I don't think the mere observation of a consistent manner in which one party is exercising peremptory challenges, at least a portion of them, is sufficient to impute or

establish an improper motive for the exercise of the challenges in that fashion, at least in this context, and given the rather obvious and reasonable alternative, i.e., I wouldn't be bothered at all by race or ethnic background of a juror in the respect I do if the defendant didn't happen to share that race and background; and if we have an Armenian, Greek, Irishman, Jew, I would be content with a jury of 12 blacks if it came out that way. What I would not be content with is a jury of 12 Greeks, Armenians, or Jews if they happened to be of the same heritage as the defendant.

Giving that kind of obvious and reasonable, it seems to me, reply, then the objective fact as noted by defense seems to me to fall short of the sort of allegations that would make a hearing necessary and appropriate, as contrasted, for example, if the defense were in a position to say not only what has been said but that the prosecutor was overheard saying

"I would not have a person of 'X' race or religion on any of my juries at any time or under any circumstances even if the defendant were an individual from outerspace."

If you could punch up allegations of that sort, then I think we'd have something but, of course, there is no hint -- no suggestion of any such base motive on the part of the assistant district attorney before the Court, at least as I understand it.

MR. DECKLER: That's correct.

THE COURT: And that being the case, it seems to me that the allegations fall objectively short of facts sufficient to justify the interruption of the proceedings for the purpose of holding a hearing, and I think this is especially true in the light of the - at least, qualified privilege referred to relative to the exercise of peremptory challenges.

I would be inclined to agree that the privilege is qualified and that they are not

completely immune from inquiry, but I think the facts must be a good deal stronger than those here we are talking about, that sort of prying and interrupting, for that purpose, the orderly administration of justice.

If, for example, on the basis of a pattern in the exercise of peremptory challenges, either side, in any circumstances, would be entitled to a hearing to inquire, well, it seems to me, the trial would hardly pass without one side or another, or both, being entitled to the sort of hearing that you've requested and with unfortunate and conceivably disastrous implications and consequences relative to the orderly and expeditious administration of justice on the basis stated.

Then, unless you have something more to add, application is denied.

MR. DECKLER: Respectfully excepted.

THE COURT: Both sides ready to proceed?

MR. DECKLER: Yes.

MISS LITWIN: Yes.

THE COURT: Call in the Panel. The sworn jurors will remain in the jury room.

No. 82-1381

IN THE

Supreme Court of the United States

October Term, 1982

MICHAEL McCRAY,
Petitioner,

—*v.*—

THE STATE OF NEW YORK,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

RESPONDENT'S BRIEF AND APPENDIX IN SUPPORT OF THE PETITION

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Questions Presented

1. Whether the sixth amendment right to trial by jury, made applicable to the states through the fourteenth amendment in *Duncan v. Louisiana*, 391 U.S. 145 (1968), prohibits the use of the peremptory challenge in a criminal case to exclude prospective jurors solely on the basis of race.

2. Whether the equal protection or due process clause of the fourteenth amendment prohibits the use of the peremptory challenge to exclude prospective jurors in a particular case solely on the basis of race, notwithstanding the holding in *Swain v. Alabama*, 380 U.S. 202 (1965), that such exclusion would constitute a denial of equal protection only if it occurred on a systematic basis in case after case over a period of time.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN SUPPORT OF THE PETITION

The Respondent, the State of New York, respectfully requests that this Court grant the petition for writ of certiorari, seeking review of the decision of the New York Court of Appeals in this case. That opinion is reported at 57 N.Y.2d 542.

Opinions Below

The opinion of the Court of Appeals of the State of New York appears at 57 N.Y.2d 542. That decision is reproduced in Petitioner's Appendix at 1a-40a. The decision of the Appellate Division of the Supreme Court of the State of New York, Second Department, is an affirm-

ance without opinion, reported at 84 A.D.2d 769. The opinion of the Supreme Court, Kings County, denying petitioner's post-conviction motion was delivered orally and never reported; a transcript appears in Respondent's Appendix at 1a-7a. The decision of the trial court denying petitioner's motion during voir dire was originally rendered orally, and a transcript appears in Petitioner's Appendix at 51a-67a; that decision was later set forth in a memorandum opinion which is reported at 104 Misc. 2d 782.

Jurisdiction

The judgment of the Court of Appeals for the State of New York was entered on December 14, 1982. The petition for certiorari was filed within 60 days of that date. Petitioner has invoked this Court's jurisdiction under 28 U.S.C. § 1257(3). Alternatively, this petition may be treated as an appeal, invoking this Court's jurisdiction under 28 U.S.C. § 1257(2).

Statutory and Constitutional Provisions Involved

New York Criminal Procedure Law § 270.25:

1. A peremptory challenge is an objection to a prospective juror for which no reason need be assigned. Upon any peremptory challenge, the court must exclude the person challenged from service.

2. Each party must be allowed the following number of peremptory challenges:

* * *

(b) Fifteen for the regular jurors if the highest crime charged is a class B or class C felony, and two for each alternate juror to be selected.

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

United States Constitution, Fourteenth Amendment:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Introduction

Michael McCray was convicted after a jury trial in Supreme Court, Kings County, of Robbery in the First Degree and Robbery in the Second Degree [New York Penal Law § 160.15(4) and § 160.10(1)].

He was sentenced on February 19, 1981, to concurrent terms of imprisonment of from two to six years for the Robbery in the First Degree, and from one and one-half to four and one-half years for the Robbery in the Second Degree. The conviction was unanimously affirmed by the Appellate Division, Second Department. 84 A.D.2d 769. That judgment was affirmed by a closely divided Court of Appeals on December 14, 1982. 57 N.Y.2d 542.

McCray is presently at liberty pursuant to a stay of execution granted by Justice Marshall until disposition of this petition for a writ of certiorari.

The Evidence at Trial

Michael McCray was convicted of a gunpoint robbery of Philip Roberts on the evening of November 15, 1978.

McCray and two companions [1] watched Roberts, an art student, withdraw money from a bank cash dispensing machine, and then pushed him into the vestibule of an apartment building and took his keys and his money.

On two occasions Roberts drove around the neighborhood with police officers in an unsuccessful effort to locate his assailants. On a third such occasion, three weeks after the robbery, Roberts pointed out McCray from a group of four individuals standing on a corner, and the police arrested him.

The Challenge to the Jury Selection

By statute, each party to this litigation was entitled to fifteen peremptory challenges, plus two for each prospective alternate juror. N.Y. Crim. Proc. Law § 270.25 (2)(b). During jury selection, defense counsel moved for a mistrial, claiming that the prosecutor had unlawfully used peremptory challenges to exclude jurors on the basis of race. He moved, in the alternative, for a hearing to inquire into the prosecutor's use of the peremptory challenge.

Defense counsel specifically invoked the equal protection clause of the United States Constitution, and Section 500 of the New York State Judiciary Law, which provides for trial by a jury selected from a fair cross section of the community.

At the time of the motions, the prosecutor had exercised seven peremptory challenges against blacks and one against a Hispanic. In addition, she had exercised three or four peremptory challenges against whites. The record does not show how many blacks or Hispanics were excluded

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[1] The other two participants have not been identified.

by defense counsel, or how many were successfully challenged by either side for cause.

Both motions were denied on April 24, 1980 (Pet. App. 51a-67a). The rulings were subsequently set forth in a memorandum opinion issued after the verdict, on June 13, 1980, and reported at 104 Misc.2d 782.[2]

Jury selection continued, resulting in the selection of twelve jurors and two alternates. While the record is not clear in this regard, it is the recollection of both trial counsel that the twelve jurors were white, and one of the alternates was black (See Resp. App. 2a-5a).

After the April 28 verdict, and after the June 13 opinion on the motion for mistrial, new defense counsel entered the case on June 16. At that time he renewed McCray's objection to the jury selection, moving to set aside the verdict on the ground that the jury selection process had denied McCray a fair and impartial trial. At this time he based his claim on "our Constitution", without specifying either the federal or state constitution. This motion was denied in an oral ruling from the bench (Resp. App. 5a-7a).

On appeal to the Appellate Division, and again in the Court of Appeals, McCray continued to press his claim that the prosecutor unconstitutionally used the peremptory challenge to exclude prospective jurors solely on the basis of race. He based that claim in the state appellate courts on the due process and equal protection clauses of the United States Constitution, as well as the principles of due process and equal protection found in the New York State Constitution. The Appellate Division rejected his claim without opinion. 84 A.D.2d 769. The Court of

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[2] Petitioner incorrectly describes this opinion as a ruling on the post-judgment motion.

Appeals rejected the claim in a lengthy opinion, expressly rejecting not only the state constitutional claims but also the claims based on the sixth amendment right to jury trial and the fourteenth amendment rights to due process and equal protection. 57 N.Y.2d 542.

Reasons For Granting The Writ

1. The Decision Below Raises a Significant and Recurring Question of Law Concerning Race Discrimination in the Jury Selection Process.

The New York Court of Appeals has construed the New York State statute defining the peremptory challenge to permit a party to exclude prospective jurors solely on the basis of race, and that court has upheld the statute against federal constitutional attack.

This Court has never decided whether the racially based use of the peremptory challenge violates the sixth amendment right to a jury drawn from a representative cross section of the community. The Court held in *Swain v. Alabama*, 380 U.S. 202 (1965), that the racially based use of the peremptory challenge did not violate the equal protection clause, unless it was a systematic practice of a particular prosecutor's office, in case after case over a period of time. But *Swain* was decided before the sixth amendment right to a jury trial was made applicable to the States in *Duncan v. Louisiana*, 391 U.S. 145 (1968), and thus it did not decide whether the sixth amendment protects the individual defendant against race discrimination in jury selection, even if the equal protection clause does not.

The holding in *Swain* should be reconsidered, because an individual defendant's rights are as much violated by racial discrimination in a single case as by racial discrimination that is part of a broader pattern and practice.

The equal protection clause prohibits isolated acts of racism as well as systematic racial discrimination. *Swain* is perhaps best understood as an acknowledgement of the fact that it is difficult to prove isolated acts of race discrimination during jury selection, and hence, as a practical matter, only systematic discrimination will ordinarily be detected.

In rejecting the equal protection claim, this Court analyzed the function of the peremptory challenge. The Court reasoned that the challenge is designed to enable counsel to exclude jurors, not only for demonstrable bias, but for "real or imagined partiality that is less easily designated or demonstrable." 380 U.S. at 220. For that purpose, the Court held that it may be necessary in a proper case to consider race and other group affiliations. The Court also invoked pragmatic reasons for rejecting Swain's claim. The rule advanced by Swain, and by the defendant in this case, might require an examination of the prosecutor's reasons for peremptory challenges in every case. The *Swain* Court regarded this prospect as likely to undermine many lawful uses of the peremptory challenge in securing a fair and impartial jury. Finally, an examination of the prosecutor's motives in every case would be burdensome in practice, and would be inconsistent with the presumption that a prosecutor ordinarily acts lawfully. 380 U.S. at 222.

But in fact a number of states have found in their state constitutions a prohibition against the racially based use of the peremptory challenge, and those states have not found it unduly burdensome to administer the rule. This experience, coupled with the fact that the practice of excluding jurors on the basis of race continues to plague the judicial system, provides ample reason to reconsider *Swain*.

Moreover, the Court is free to re-examine the constitutional validity of the practice without disturbing the

holding in *Swain*. This Court has made it clear that jury selection practices may violate the sixth amendment right to a jury drawn from a cross section of the community, even when those practices do not violate the defendant's right to equal protection of the laws. *Taylor v. Louisiana*, 419 U.S. 522, 526-34 (1975).

It is inherent in the very idea of a jury that it must be drawn from a fair cross section of the community, in order that the jury may fairly reflect the common sense judgment of the community. *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). The right to a jury trial is clearly violated by the deliberate exclusion of a particular group from jury service on the basis of race, sex, or certain other characteristics. *Taylor v. Louisiana*, 419 U.S. at 528; *Peters v. Kiff*, 407 U.S. 493, 500 (1972). The question presented by this case is whether, when there is a claim that the peremptory challenge has been used to accomplish that deliberate exclusion, the claim is immune from judicial scrutiny.[3] This Court should hold that it is not.

While the peremptory challenge is an important and traditional part of the statutory scheme for jury selection, N.Y. Crim. Proc. Law § 270.25, it is not more impor-

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[3] This case squarely presents the issue, because the defendant claimed that the prosecutor was excluding prospective jurors on the basis of race, and the trial court denied a hearing on that issue and rejected the claim. The State contends that no such discrimination in fact occurred, and that even under the constitutional rule defendant seeks, he would not be entited to a hearing or a reversal of his conviction. That factual claim is not, however, free from doubt, and it was rejected by the dissenters below. It should not, therefore, constitute a bar to review of the decision by this Court.

Indeed, review in this case would also be proper under the mandatory appellate jurisdiction conferred on this Court by 28 U.S.C. § 1257(2), because in the decision below, a state court upheld a state statute against federal constitutional attack.

tant than the sixth amendment guarantee of trial by a jury drawn from a fair cross section of the community. The sixth amendment guarantees the right to a jury selected in a manner that provides a fair possibility of drawing persons of every race, sex, religion, and national origin represented in the community. While there is no requirement that every group be actually represented on the jury, every group must have a reasonable chance of being represented on the jury. The peremptory challenge may not constitutionally be used to defeat that right.

2. The Decision Below Conflicts with the Decisions of Other State Courts, and the Conflict is Likely to Grow as a Result of Widespread Litigation of the Issue in Numerous State Courts.

Intermediate appellate courts in California, Illinois, and New York recently held that the sixth amendment prohibits the racially based use of the peremptory challenge.[4] *People v. Lucero*, 99 Cal. App. 3d 17 (1979); *People v. Payne*, 106 Ill. App. 3d 1034, 436 N.E.2d 1046 (1982); *People v. Thompson*, 79 A.D.2d 87, 93-94, 435 N.Y.S.2d 739, 745-46 (2d Dep't 1981), *appeal withdrawn*, 55 N.Y.2d 879 (1982). In both Illinois and New York, the decisions were subsequently overruled by the highest state court. *People v. Davis*, 32 Crim. L. Rep. 2463 (Ill. Feb. 18, 1983); *People v. McCray*, 57 N.Y.2d 542, 457 N.Y.S.2d 441 (1982). Nevertheless, these decisions created considerable uncertainty, in a pattern that is likely to recur as other states consider the issue. *Cf. State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (1980) (questioning continuing vitality of *Swain*).

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[4] No federal court has so construed the sixth amendment. *See United States v. Newman*, 549 F.2d 240 (2d Cir. 1977); *United States v. Pearson*, 448 F.2d 1207 (5th Cir. 1971); *Green v. United States*, 486 F. Supp. 199 (W.D. Mo. 1980).

Moreover, several state courts have found in their state constitutions a prohibition on the use of the peremptory challenge to exclude jurors on the basis of race. The California Supreme Court held in 1978 that the use of peremptory challenges by either the prosecutor or defense counsel to remove prospective jurors on the basis of race and certain other characteristics violates the right to trial by jury as guaranteed by the California Constitution. *People v. Wheeler*, 22 Cal.3d 258, 277-78, 283 n.29, 583 P.2d 748, 761-62, 765 n.29, 148 Cal. Rptr. 890, 903, 907 n.29 (1978).

Other state courts have followed *Wheeler*, and construed their state constitutions similarly. *See, e.g., Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (1980); *cf., People v. Smith*, 622 P.2d 90 (Colo. Ct. App. 1980); *State v. Brown*, 371 So.2d 751 (La. 1979).[5]

This issue is now being litigated in one state after another. In each case, the courts have been troubled by the relevance of *Swain* and of the sixth amendment, as

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[5] Other state courts have followed *Swain* in refusing to construe their state constitutions to prohibit the racially based use of the peremptory challenge in a particular case. These courts hold that a constitutional claim is stated only by a charge that the prosecutor is systematically excluding blacks from juries in many cases over a period of time. *See, e.g., Pippin v. State*, 151 Ga. App. 225, 259 S.E.2d 488 (1979); *People v. Davis*, 32 Crim. L. Rep. 2463 (Ill. Feb. 18, 1983); *State v. Stewart*, 225 Kan. 410, 591 P.2d 166 (1979); *Lawrence v. Maryland*, 51 Md. App. 575, 444 A.2d 478 (1982); *State v. Davis*, 529 S.W.2d 10 (Mo. App. 1975); *Commonwealth v. Henderson*, 497 Pa. 23, 438 A.2d 951 (1981); *Drew v. Tennessee*, 588 S.W.2d 562 (Tenn. Crim. App. 1979); *State v. Grady*, 93 Wis.2d 1, 286 N.W.2d 607 (Wis. App. 1979). *See generally*, Annot., Use of Peremptory Challenge to Exclude from Jury Persons Belonging to Class or Race, 79 A.L.R.3d 14 (1977).

well as by their own state constitutions. This Court should eliminate the confusion in the lower courts and decide whether the sixth amendment prohibits the racially based use of the peremptory challenge.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the New York Court of Appeals.

Respectfully submitted,

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Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

CRIMINAL TERM: PART 28

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

MICHAEL MCCRAY,

Defendant.

Indictment No. 4189/78 June 16, 1980

CENTRAL COURT BUILDING
120 Schermerhorn Street
Brooklyn, New York

BEFORE:

THE HONORABLE JAMES G. STARKEY,
Justice.

APPEARANCES:

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Appearing for the People
COURTENAY WILTSHIRE, Esq.,
166 Montague Street,
Brooklyn, New York,
Appearing for the Defendant

KENNETH LETTS
Official Court Reporter

* * *

MR. WILTSHIRE: At this time I'd like to make a motion, which might have been made by Mr. Deckler before.

THE COURT: Yes.

Motion

MR. WILTSHIRE: But I'm making a motion to set aside the verdict on the grounds that this defendant was not afforded a fair and impartial trial based upon the voir dire, or the selection of the jury.

Now, in basing my motion—I'm basing my motion on information furnished to me, from what I have read in the record and from the notes of what Mr. Deckler tells me.

THE COURT: Are you talking about the manner in which peremptory challenges were exercised?

MR. WILTSHIRE: What's that?

THE COURT: I said, are you talking about the manner in which peremptory challenges were exercised?

MR. WILTSHIRE: Yes, that's right.

Now, our constitution sets forth the fact that a defendant is entitled to be tried by a jury of his own peers.

Now, in the first trial, as I was told, we had a hung jury. On that jury there were nine whites and three blacks.

I was informed that the three blacks were against convicting this defendant. As a result of that there was a mistrial. Based upon what I was told.

On the second trial we find the District Attorney of Kings County used peremptory challenges as a subterfuge to select twelve jurors that were non-black.

THE COURT: I'm not sure that was the case, Mr. Wiltshire.

MR. WILTSHIRE: Judge, I want to go on the record in what I was told. Now—

Motion

THE COURT: Just a moment. My memory's a bit hazy, but what is your source and authority for the proposition—

MR. WILTSHIRE: My source is from what Mr. Deckler told me on the telephone.

Now, you know, telephone conversations are not too reliable, but I know Mr. Deckler and I recall he told me that I have not been able to review his entire record because the record was not available to me. But I'm making this as a blanket motion.

THE COURT: What I'm saying, Mr. Wiltshire, is that after all is said and done it seems to me that the motion you are making assumes a fact that is not in evidence, after all is said and done.

I start with the proposition that according to my recollection the motion for mistrial essentially on the grounds that the prosecution was using its peremptory challenges to challenge those who were people of the same race as the defendant was made about halfway through jury selection.

MR. WILTSHIRE: Well, Judge, did Mr. Deckler challenge that, if he made the challenge?

THE COURT: Just—yes. According to my recollection also—and it is subject to correction, of course, if I'm in error—the point was not raised or urged anymore after that motion midway through jury selection.

That is to say after all is said and done I suspect the transcript does not show that the jurors, all of them selected after that motion had been denied, were all white.

Do you follow me?

MR. WILTSHIRE: I follow you.

THE COURT: Further, because of my inexact memory and the time lapse since then, and human frailty I guess generally, I am unequipped to say, remember, after all is said and done, whether in fact there were some black jurors, one or more, in the group selected after that motion had been made.

And correct me if I'm wrong, the record doesn't say that they were all white, yes?

MR. WILTSHIRE: But, Judge, I mean if he did make that motion at any time during the voir dire, at any time, still I feel—

THE COURT: Oh, yes. I understand your point, Mr. Wiltshire. I was simply addressing myself to a statement you made a moment ago, which I suspect is unsupported by the record, that is, that the jury that ultimately tried the case was composed entirely of white jurors.

MR. WILTSHIRE: Well, in considering human frailty, memory and so forth, I'm just making that statement so that it may be preserved on the appeal.

THE COURT: Sure. I did not want a statement like that, which does not necessarily, according with my recollection, and further in the face of some doubt that the transcript, the trial record, supports it, to stand uncontradicted.

MR. WILTSHIRE: I understand that, Judge. Because I'm at a disadvantage because I was not the trial attorney. But I merely want to go on record as making that statement now.

THE COURT: Yes.

MR. WILTSHIRE: To set aside the verdict on the basis already mentioned.

At this time, after making that motion, I'm ready for —unless the district attorney may want to respond.

MR. MC NAUGHTON: Well, your Honor, I was not the trial attorney in this case. Miss Litwin was the assistant district attorney who presented the case. I'm sure counsel is suggesting he has a right to have an entirely black jury. I'm sure she did not exercise the challenges in the manner in which counsel suggests. I was not the attorney who was present. I do not know what the makeup of the jury was. However, I am familiar with case law, which would allow a district attorney to exercise his peremptory challenges in any way he sees fit short of excluding on a systematic basis people of the same race as the defendant. I'm sure that that wasn't done in this case. However, I don't really want to address myself to the merits of counsel's claim, because I was not present. Counsel's not aware of the facts and I'm not sure what the jury makeup was and how the challenges were exercised in this case.

THE COURT: Yes.

MR. MC NAUGHTON: Excuse me, your Honor. Could we approach for a minute?

THE COURT: Yes.

(Whereupon there was an off-the-record bench conference among the Court and both counsel, after which the following occured:)

MR. WILTSHIRE: We're ready now for sentencing, Judge.

THE COURT: Mr. Wiltshire, the motion is denied, as it was when made in the first instance. Though the question raised, it seems to me now, and it did then, is one that would be deserved of a bit more discussion of the

legal principles that apply. And a decision will be filed dealing with those issues I think probably later today. So though the discussion is necessarily brief at this point, the Supreme Court decision Swayne (phonetic) against Alabama seems controlling to me on the issue, and says, after all is said and done, and seems to me with some cogency, that the exercise of peremptory challenges solely and exclusively on the basis of race is improper, but that the exercise of peremptory challenges for the purpose of excusing prospective jurors of the same race, national heritage, religious persuasion or whatever, as the defendant, is a whole different story. And therefore to challenge Irishmen in jury selection where the defendant is an Irishman, Armenians when the defendant is an Armenian and blacks where the defendant is black is not a challenge based upon race, for example, but rather on potential affinity, at least presumptively. And that potential affinity is, after all is said and done, historically one that has been deemed a reasonable and acceptable approach to jury selection.

As said in substance by the Supreme Court at one point in Faye against the State of New York, "A defendant is entitled to a fair jury; he is not entitled to friends on the jury."

That being the case, the Supreme Court has said that the manner in which challenges are exercised in a single case must, presumptively, be viewed or viewed presumptively as one exercised in accord with the historically acceptable potential affinity route, as opposed to a situation where if it were capable of demonstration, that the prosecution consistently, case after case, said I will not have a black on one of my juries or I will not have a Pole on one of my juries, I will not have an Armenian on one of my juries, no matter who the defendant is, no matter what the circumstances are, then you're into a different question.

Motion

Further, it seems to me, though the Supreme Court in Swayne against Alabama did not refer to it, it seems sort of self-evident that if in a single case you had a pattern of excusals, coupled with a flat admission on the part of the prosecution that was being exercised on racial or national heritage grounds, and not on the basis of affinity, you would again have a situation that would take it out of the presumptively correct and acceptable mode of exercise for peremptory challenges on the basis of potential affinity.

But of course we don't have either of those situations in this case.

There has been no suggestion, indeed it seems to me that your predecessor as counsel, Mr. Deckler, specifically disavowed the claim that the prosecution was exercising the challenges on the basis of race as opposed to potential affinity, and specifically disavowed any suggestion there has been a consistent pattern in a number of cases where that would suggest that the prosecution was doing any such a thing.

There is authority based upon cases out of California and Massachusetts, and indeed one written by Judge Framer of this court in New York County, holding that potential affinity or group affiliation, as it is called sometimes, is also objectionable and violation of the constitutional provision guaranteeing equal protection of the laws, among possibly others, but they are in a distinct minority, at variance with the Supreme Court's holding in Swayne against Alabama, and hold a viewpoint with which this Court specifically disagrees.

More on that, of course, when the decision which I have made reference to is filed. I'm sure you'll have no trouble getting a copy of it.

MR. WILTSHIRE: Yes. Thank you.